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No. 08-439

Supreme Court, U.S.
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In the Supreme Court of the United States

MARCEL WINDT; E.T. MEIJER, IN THEIR CAPACITY AS TRUSTEES IN BANKRUPTCY FOR KPNQWEST, N.V.,
Petitioners,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.; JOHN A. MCMASTER; JOSEPH P. NACCHIO; ROBERT S. WOODRUFF
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INSOL EUROPE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Dutch bankruptcy trustees may bring a lawsuit against U.S. defendants in a U.S. forum where a treaty between the United States and the Netherlands and the U.S. Bankruptcy Code authorize such lawsuits.

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BRIEF OF INSOL EUROPE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

INSOL Europe is a professional association with over 1,000 members. Founded in 1981 and based in Paris, it is devoted to issues of insolvency, bankruptcy, and business reconstruction and recovery. INSOL Europe facilitates the exchange of information and ideas, promotes best practice guidelines, publishes a newsletter, maintains a website, holds discussions with official European and International bodies responsible for the insolvency and restructuring process, and encourages greater co-operation and communication among insolvency professionals, the credit community, and related constituencies. INSOL Europe is a member association of INSOL International, a world-wide federation based in London.

INSOL Europe has a substantial interest in this Court's review of the ruling below, which dismissed a lawsuit brought by Dutch bankruptcy trustees as "inconvenient." Bankruptcy and insolvency practice is becoming increasingly global in scope. Bankruptcy courts and their appointed representatives must be able to pursue claims and assets across borders if they are to perform their vital functions properly. The dismissal of this lawsuit on *forum non conveniens* grounds—notwithstanding that it was filed

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and discloses that petitioners made a monetary contribution to its preparation and submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

against U.S. defendants with the approval of the Dutch bankruptcy court—can only undermine the required cross-border cooperation. INSOL Europe is particularly concerned because the rulings below appear inconsistent with provisions in the U.S. Bankruptcy Code that authorize lawsuits in U.S. courts by foreign bankruptcy trustees, as well as with provisions in the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands that guarantee equal access to U.S. courts by Dutch nationals. We believe that the experience of our membership will assist the Court in determining whether to review the decision below.

SUMMARY OF ARGUMENT

The threshold dismissal of the Dutch Trustees' lawsuit as "inconvenient" appears to conflict with the authorization for such suits in both the U.S. Bankruptcy Code and a commercial treaty between the United States and the Netherlands. It also appears to misapply the *forum non conveniens* doctrine.

Chapter 15 of the Bankruptcy Code, 11 U.S.C. § 1501 *et seq.*, authorizes foreign representatives (including bankruptcy trustees) to bring claims in U.S. courts if they are in connection with a foreign proceeding. The courts below failed to take account of that authorization in evaluating the merits of respondents' *forum non conveniens* motion.

The Treaty of Friendship, Commerce and Navigation between the Kingdom of the Netherlands and the United States, Mar. 27, 1956, 8 U.S.T. 2043 ("FCN Treaty"), mandates "national treatment" with respect to court access by nationals of the other treaty party. The courts below disregarded that

mandate in adjudicating respondents' *forum non conveniens* motion.

INSOL Europe respectfully requests that this Court review the rulings below in light of these Bankruptcy Code and FCN Treaty provisions. INSOL Europe further suggests that this Court revisit its statement in *Piper Aircraft* that foreign plaintiffs are entitled to less deference in their choice of a U.S. forum, at least where (as here) the defendants reside in the United States.

ARGUMENT

As petitioners contend, the focus of the courts below on the District of New Jersey, rather than on the United States as a whole, for *forum non conveniens* purposes warrants this Court's review. The Court also should review the failure of the courts below to give effect to two expressions of United States policy—Chapter 15 of the U.S. Bankruptcy Code and the FCN Treaty between the Netherlands and the United States. INSOL Europe respectfully requests that the Court grant the petition to ensure that U.S. courts apply these provisions and accord foreign plaintiffs bringing suit against U.S. defendants the same level of deference that U.S. plaintiffs receive with respect to choice of forum.

I. Chapter 15 Of The Bankruptcy Code Mandates Equal Access To U.S. Courts For Foreign Bankruptcy Trustees.

In 2005, Congress added a new chapter to the Bankruptcy Code. The new Chapter 15 was based on the Model Law on Cross-Border Insolvencies drafted by the United Nations Commission on International Trade Law ("UNCITRAL"). See 11 U.S.C. § 1501; Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am.

Bankr. L.J. 713, 719 (2005) ("Chapter 15 was drafted to follow the Model Law as closely as possible").

The purpose of the new law was to foster cross-border cooperation in insolvency-related proceedings:

> The purpose of this chapter is to * * * provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment; * * *.

11 U.S.C. § 1501(a). Chapter 15 applies where "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding." *Id.* § 1501(b). A foreign representative may seek recognition of a foreign proceeding or "sue in a court in the United States to collect or recover a claim which is the property of the debtor." *Id.* §§ 1509(a), (f). U.S. courts are directed to "cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee." *Id.* § 1525(a).

The impact of these provisions must be considered when determining whether Dutch bankruptcy trustees may proceed with a lawsuit in a U.S. court to recover funds for the bankruptcy estate from defendants residing in the United States. Yet, the

Third Circuit did not even *mention* Chapter 15. Although the district court did mention Chapter 15, it misread it to apply only to a "*debtor* that is subject to a bankruptcy case of some kind in the United States." Pet. App. 91a. As the above provisions make clear, Chapter 15 is not so constricted, authorizing lawsuits by "a foreign representative in connection with a foreign proceeding." 11 U.S.C. § 1501(b). Petitioners are foreign representatives (court-authorized bankruptcy trustees) who, in connection with a foreign proceeding, seek to recover funds allegedly misappropriated from the debtor. Pet. App. 4a. In addressing respondents' *forum non conveniens* motion, the district court should not have given Chapter 15 such short shrift.

The claim at issue, involving allegations that U.S. defendants directed a scheme from the United States to impose harm on a Dutch entity, appears particularly well-suited to adjudication in the United States. Just as a trustee in a domestic bankruptcy is authorized to bring actions to "collect and reduce to money the property of the estate for which such trustee serves" (11 U.S.C. § 704(a)), a foreign trustee often can perform those essential tasks only if it may file proceedings in the United States.

Global commerce produces global insolvencies and bankruptcies. Today, "[a]s the ripples of the credit crunch's effect are felt across the globe, the chances of insolvencies happening across borders and jurisdictions are more likely than ever." Editor's Note to Adam Gallagher, *European Insolvency Regulation: German Court Blesses Change of COMI to Bolster Cross-Border Group Restructuring*, 27 Am. Bankr. Inst. J. 30, 30 (2008). These sprawling bankruptcies give rise to massive proceedings that cannot

be confined to the courts of a single nation. "Economic globalization and integration over the last decade has vastly increased the number of companies that operate, own assets, or otherwise conduct business in multiple countries." Aaron L. Hammer & Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know about Cross-Border Insolvency Legislation in the United States*, 14 L. & Bus. Rev. Am. 257, 258 (2008). Bankruptcy proceedings must follow those assets and businesses across national borders. Indeed, "it is increasingly unusual to find a major case without at least some international aspects." *Ibid.*

The Model Law that Congress incorporated into the Bankruptcy Code as Chapter 15 sought to heal an intolerable disconnect between the global nature of such bankruptcies and the local nature of insolvency and bankruptcy law. Its purpose was to overcome "inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder maximization of the value of those assets." *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* ¶ 13, Annex 1 of the Report of the 30th Session of UNCITRAL, U.N. Doc. A/CN.9/442 (1997). To achieve that purpose, Chapter 15 ensures that foreign parties have access to U.S. courts on par with that of domestic parties, thereby providing "greater legal certainty for trade and investment." H. Rep. No. 109-31, at 105 (2005).

Cross-border litigation in relation to global bankruptcies is now widely authorized throughout the world. Indeed, fifteen nations have incorporated a version of the Model Law into their own bankruptcy codes. See *Australia Adopts Legislation Based on UNCITRAL Model Law on Cross-Border Insolvency*, UN Information Service, May 21, 2008.[2] As one of those nations, the United States has an obligation to adjudicate authorized claims brought in connection with foreign bankruptcy proceedings. Instead, the courts below established unduly steep barriers to the initiation of such litigation by foreign parties, contrary to the will of Congress.

In enacting Chapter 15, Congress made "comity" the "central concept." H. Rep. No. 109-31, *supra*, at 109; see 11 U.S.C. § 1508 ("In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions"). The district court's dismissal of petitioners' suit as inconvenient, and the affirmance of that ruling by the Third Circuit, will inevitably be viewed as a rejection of comity, which is grounded (at least in part) in reciprocity. See Joseph Story, COMMENTARIES ON THE CONFLICT OF LAWS § 35 (M. Bigelow ed. 1883) (comity requires that our courts render justice to foreign parties "in order that justice may be done to us in return"); *Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895). If courts shut the courthouse door to lawsuits filed by foreign parties in connection with foreign proceedings, retaliation against U.S. parties abroad is likely,

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[2] Available at http://www.unis.unvienna.org/unis/pressrels/2008/unisl118.html.

a harm Congress sought to avoid. This Court should grant the petition to ensure that U.S. courts understand the purpose of Chapter 15 and do not misapply the *forum non conveniens* doctrine to effectively bar such lawsuits by foreign bankruptcy trustees.

II. The Dutch-U.S. FCN Treaty Mandates National Treatment When Foreign Plaintiffs Sue In U.S. Courts.

In 1957, the Netherlands and the United States entered into a bilateral treaty that, *inter alia*, provides that nationals of each party "shall be accorded *national treatment* with respect to access to the courts of justice * * * in all degrees of jurisdiction, both in pursuit and in defense of their rights." FCN Treaty, art. V.1 (emphasis added). The treaty defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals [of] such Party." *Id.* art. 23.1. Treaty interpretation must "begin with the language of the Treaty itself." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). That language mandates that U.S. courts are to treat Dutch plaintiffs as if they were U.S. nationals.

The courts below failed to heed that mandate. The district court denied that there is an FCN treaty between the Netherlands and the United States (Pet. App. 57a n.14), and the Third Circuit did not even mention the treaty. Moreover, they accorded the Dutch Trustees' choice of a U.S. forum little or no deference, in contrast to the substantial deference accorded to the choice of forum by a domestic plaintiff. See Pet. App. 13a-15a. Such differential treatment cannot be reconciled with the "national treatment" mandate of the treaty.

An FCN treaty is "one of the most familiar instruments known to diplomatic tradition." Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 805 (1958). Since the first such treaty in 1778 with France, FCN treaties have "figured repeatedly in the conduct of American foreign relations." *Ibid.*; see Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 Cornell Int'l L.J. 201, 204 (1988). The FCN Treaty with the Netherlands is one of twenty-one similar treaties entered into by the United States after World War II. National treatment provisions were included in the post-World War II treaties to prevent obstacles to court access through domestication, registration, or other discriminatory requirements. Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 235 (1956). National treatment "is ordinarily the highest level of protection afforded by commercial treaties." *Sumitomo Shoji*, 457 U.S. at 188.

Courts must "respect treaty stipulations when they become the subject of judicial proceedings" because "the honor of the government and people of the United States is involved." *Chew Heong* v. *United States*, 112 U.S. 536, 540 (1884). Failure to enforce the FCN's national treatment provision would undermine the interests of the United States. As the Seventh Circuit has noted, "the rights granted by the [U.S.-Japan FCN Treaty] are reciprocal." *Fortino* v. *Quasar Co.*, 950 F.2d 389, 393-394 (7th Cir. 1991). Thus, any discrimination against foreign parties in U.S. courts is likely to result in reciprocal discrimination against U.S. parties abroad. The very purpose of national treatment provisions is to replace such

retaliation (and its inevitable escalation) with cooperation and mutually enforceable rights.

The Third Circuit's failure to account for the FCN Treaty deviates from these established principles and conflicts with the approach of other courts of appeals. The Second Circuit, for example, accords "the same deference as that afforded the choice of a U.S. citizen" to a foreign plaintiff's forum choice, if the plaintiff's country has an FCN treaty with the U.S. that includes a national treatment provision. *Pollux Holding Ltd.* v. *Chase Manhattan Bank*, 329 F.3d 64, 72-73 (2d Cir. 2003); *Irish Nat'l Ins. Co.* v. *AER Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984); *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). And whereas the Ninth Circuit holds "less deference is not the same thing as no deference" (*Lueck* v. *Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001)), the Third Circuit accorded virtually no deference to the Trustees' choice of a U.S. forum. See Pet. App. 12a.

Such conflicting applications of similar treaty provisions prevent the United States from speaking with a uniform voice and can only undermine the confidence that other countries require before entering into treaties with the United States. This Court should resolve this conflict to ensure that the treaty rights of foreign plaintiffs are given effect in accord with established U.S. policy.

III. The Court Should Revisit Its *Piper Aircraft* Statement That A Foreign Plaintiff's Choice Of Forum Is Entitled To Less Deference.

The courts below relied in part on a statement in *Piper Aircraft* v. *Reyno*, 454 U.S. 235, 256 (1981), that a foreign plaintiff's choice of forum warrants

"less deference" than a domestic plaintiff's. That statement, representing the plurality view of four Justices, should be revisited.[3] See Eugene Gressman et al., SUPREME COURT PRACTICE 252-253 (9th ed. 2007) (certiorari is often granted because a prior Court precedent is "ripe for reexamination").

First, the Court provided no guidance as to what "less deference" means and, in particular, whether deference is reduced when the defendants reside in the U.S. Lacking such guidance, some courts have accorded virtually *no* deference to the forum choice of foreign plaintiffs, an approach at odds with this Court's doctrine that, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).

The decision below is a good example of such an over-extension of *Piper Aircraft*. The Third Circuit ruled that a foreign plaintiff must make a "strong showing" by presenting "considerable evidence" to "overcome" a presumption that its forum choice was inconvenient. Pet. App. 12a-13a. That heavy burden creates a virtually insuperable barrier to suits by foreign plaintiffs in the United States. Whatever merit such a barrier may have when the defendant too is foreign, it has none when the defendant resides in the United States. The ruling below—that a claim under U.S. law brought by Dutch plaintiffs against a U.S. entity and its principals who reside in the U.S.

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[3] Justices Powell and O'Connor did not participate in the decision, and Justices White, Brennan, and Stevens dissented from that portion of the opinion. See *Piper Aircraft*, 454 U.S. at 261 (White, J., concurring in part and dissenting in part); *id.* at 261-262 (Stevens, J., dissenting).

is inconvenient for the defendants—appears to make little sense. A suit filed in the home forum of the defendant should be presumed convenient to both parties—to the plaintiff because it chose the forum, and to the defendant because that forum is its home. The adverse implications of the contrary ruling below warrant this Court's review.

Second, the *Piper Aircraft* statement has been subject to considerable criticism. Leading civil procedure commentators warn of "a significant risk of depriving, in the name of 'convenience,' a plaintiff of an American forum when the parties or controversy have a legitimate connection to the United States." Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE § 3828, at 625 (3d ed. 2007). See also *Myers* v. *Boeing Co.*, 794 P.2d 1272, 1280-1281 (Wash. 1990) (en banc) (criticizing the *Piper Aircraft* "less deference" statement for lacking "supportive analysis or reasoning," raising "concerns about xenophobia," and being unnecessary in light of the "fair and equitable results" produced by standard *forum non conveniens* balancing); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 Hous. J. Int'l L. 385, 395-396 (2004) (rejecting lesser deference for foreign plaintiffs given realities of global commerce and litigation); John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 Ohio St. L.J. 659, 691 (2004).

Finally, the basis for much of that criticism—the importance of dismantling barriers to cross-border litigation in today's global economy—is one that this Court has often endorsed. The Court has warned that a "parochial" attitude towards foreign parties

could "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 516-517 (1974). Accordingly, courts must heed the "concerns of international comity" and show "sensitivity to the need of the international commercial system." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

By failing to defer to the choice of a U.S. forum by Dutch plaintiffs on claims against U.S. defendants, the courts below departed from these fundamental principles. This Court should review those rulings and provide guidance to the lower courts on this important and recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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